



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Lyntronics, Inc.

File: B-247431

Date: June 8, 1992

Anthony Vigliotti for the protester,  
Jeffrey I. Kessler, Esq., and Lucie Sterling, Esq.,  
Department of the Army, for the agency.  
Jacqueline Maeder, Esq., Glenn Wolcott, Esq., and Paul I.  
Lieberman, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

### DIGEST

Markup charged to bidder by a supplier of foreign components is a necessary expense of acquiring foreign components and should be considered part of bidder's foreign component costs in determining whether a domestic source end product is offered for purposes of the Buy American Act.

### DECISION

Lyntronics, Inc. protests the award of a contract to Bren-Tronics, Inc. under invitation for bids (IFB) No. DAAB07-92-B-0001, issued by the Department of the Army for a non-rechargeable battery, item No. BA-1293/U, national stock number 6135-00-271-0407. Lyntronics contends that the battery offered by Bren-Tronics should have been evaluated as a foreign end product for purposes of the Buy American Act, 41 U.S.C. § 10a et seq. (1988).

We sustain the protest.

The IFB, a small business set-aside, was issued on November 15, 1991, and contemplated the award of a firm, fixed-price contract for 10,000 non-rechargeable batteries, with an option for an additional 10,000 batteries. The IFB incorporated the requirements of the Buy American Act through inclusion of the Defense Federal Acquisition Regulation Supplement (DFARS) clause titled "Buy American Act-Balance of Payments Program Certificate" and the inclusion by reference of the DFARS clause titled "Buy

American Act and Balance of Payments Program." See DFARS SS 252.225-7000 and 252.225-7001. Pursuant to the Buy American Act and its implementing regulations, an evaluation differential is to be applied to the price of bids proposing to furnish foreign end products when those bids are competing with bids of domestic end products.<sup>1</sup> The DFARS defines a domestic end product as an "end product manufactured in the United States if the cost of its . . . components which are mined, produced or manufactured in the United States exceeds 50 percent (50%) of the cost of all its components." DFARS § 252.225-7001(a). "Components" are defined as "those articles, materials and supplies directly incorporated into end products." Id.

Six bids, including those from Lyntronics and Bren-Tronics, were received by the December 17 bid opening date. Both Lyntronics and Bren-Tronics indicated they were offering domestic end products for purposes of the Buy American Act. Bren-Tronics was the low bidder; Lyntronics was second low.

The batteries offered by Bren-Tronics contain three component cells which are manufactured in Hong Kong. These foreign-manufactured cells are imported by Duracell, Inc., which tests and repackages the cells at its facility in Indianapolis, Indiana, and then resells them to Bren-Tronics at a price which includes Duracell's markup for testing, repackaging, indirect expenses, and profit.

In determining whether Bren-Tronics was offering a domestic end product for purposes of the Buy American Act, the contracting officer considered the cost of the cells to be the price that Duracell paid to the Hong Kong manufacturer rather than the price Bren-Tronics paid to Duracell.<sup>2</sup> Based on calculations using the price that Duracell paid to the Hong Kong manufacturer, the contracting officer determined that the cost of the domestic components of the batteries exceeded the cost of the foreign components and, therefore, that Bren-Tronics was offering a domestic end

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<sup>1</sup>Under the regulations applicable here, each offer of a foreign end product was to be adjusted for the purpose of evaluation by adding 50 percent of the offer, inclusive of duty. DFARS § 252.225-7001(d).

<sup>2</sup>Our decision will not discuss the specific prices paid since such information may be proprietary.

product.<sup>3</sup> As a result, no differential was applied to Bren-Tronics' bid and the contract was awarded to Bren-Tronics on January 24, 1992.<sup>4</sup> This protest followed.

Lyntronics contends that the product offered by Bren-Tronics should not qualify as a domestic end product. It argues that, under the Buy American Act, the price paid for the foreign components by Bren-Tronics's supplier is irrelevant and the foreign component cost should be conclusively established by the actual price ultimately paid by Bren-Tronics.

As noted above, the regulations implementing the Buy American Act clearly provide that the determination regarding whether an end product is foreign or domestic is based on a comparison of the cost of components which are manufactured in the United States and the cost of components which are manufactured outside the United States. Although neither the Buy American Act nor its implementing regulations define "cost" in the context of the necessary component cost calculations, it is well-settled that the cost of individual components should be calculated "in a similar manner insofar as possible," 35 Comp. Gen. 7, 9 (1955), and component costs should be compared "at equivalent levels of processing." 39 Comp. Gen. 695 (1960).

Consistent with these principles, all costs incurred by a component manufacturer which are included in the price which the manufacturer charges for the component--including costs for testing, packaging, overhead, and general and administrative (G&A) costs--are properly included in the component cost calculation. See General Kinetics, Inc., Cryptek Secure Communications Div., B-243078.2, Jan. 22, 1992, 92-1 CPD ¶ 95; Military Optics, Inc., B-245010.3; B-245010.4, Jan. 16, 1992, 92-1 CPD ¶ 78. Conversely, similar costs incurred by an offeror that does not manufacture any components of the end product are not properly included in any component cost calculation since such costs are more properly associated with the final

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<sup>3</sup>The record indicates that if the price paid by Bren-Tronics to Duracell had been considered the cost of the foreign manufactured cells for Buy American Act purposes, the cost of the foreign components would have exceeded the cost of domestic components, and Bren-Tronics's bid would have been found to be offering a foreign end product.

<sup>4</sup>The record indicates that if the applicable differential had been applied to Bren-Tronics's offer, Lyntronics would have become the low offeror.

assembly or sale of the end product itself, See id.; Bell Helicopter Textron, 59 Comp. Gen. 158 (1979), 79-2 CPD ¶ 431.

Here, a nonmanufacturing distributor or "middleman" purchases the component from a manufacturer and resells it to the offeror, with a markup which represents profit and costs related to testing and repackaging of the component. Our Office addressed this situation in TFI Corp., 59 Comp. Gen. 405 (1980), 80-1 CPD ¶ 287. In TFI, the offeror/awardee acquired foreign components from a domestic importer at a price which included a 40 percent markup for the importer. There, as here, the agency computed the foreign component costs on the basis of the price paid by the domestic importer before markup. In concluding that this component cost calculation was improper, we stated:

"the contracting officer seems to have accepted without explanation [the awardee's] assumption that the markup charged by its supplier, a domestic importer, is not properly considered part of the cost of foreign components. However, the markup was applied by a dealer which apparently is not affiliated with the contractor but may be affiliated with the manufacturer. We view such a markup as a necessary expense of acquiring the foreign component which should be treated as part of the contractor's foreign component cost."  
59 Comp. Gen. at 409.

Here, as in TFI, the awardee (Bren-Tronics) purchases the cells from a domestic importer or "middleman" (Duracell) at a price which includes Duracell's markup for testing, repackaging, overhead, G&A expense, and profit. As we stated in TFI, the "middleman's" markup is a necessary expense of acquiring the foreign component and should be treated as part of the offeror's foreign component cost."

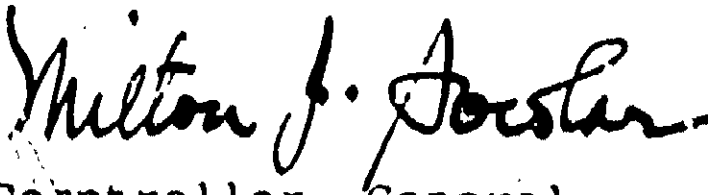
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<sup>5</sup>We believe the situation where costs are incurred by a "middleman" is comparable to the situation in which components manufactured outside the United States are shipped f.o.b. destination to the United States via a domestic carrier, where they are subsequently incorporated into an end product. In such circumstances, the price paid to the foreign manufacturer for the component includes the cost of shipping which ultimately accrues to the domestic carrier; yet, the entire price is properly considered the cost of the foreign component. See, e.g., Allen and Vickers, Inc.; American Laundry Machine, 54 Comp. Gen. 445 (1974), 74-2 CPD ¶ 304.

Accordingly, Bren-Tronics's proposal should have been evaluated as offering a foreign end product.

The protest is sustained.

Since the record shows that if the agency had properly applied the Buy American Act differential to Bren-Tronics's bid, Lyntronics would have been the low bidder. We recommend that the agency terminate its contract with Bren-Tronics and award the contract to Lyntronics, if otherwise appropriate. Lyntronics is also entitled to the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d) (1992).

*for*   
Comptroller General  
of the United States